JAMES MOORMAN
JOHN HOFFMAN
BARRY FISHER
Sierra Club Legal Defense Fund, Inc.
311 California Street, Suite 311
San Francisco, California 94104
Telephone: (415) 398-1411

FELDMAN, WALDMAN & KLINE
LELAND R. SELNA, JR.
2700 Russ Building
San Francisco, California 94104
Telephone: (415) 981-1300

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al., Plaintiffs, v. ROGERS C. B. MORTON, et al., Defendants.	CIVIL NO. 51464 WTS
COUNTY OF TULARE, Applicant in Intervention.	

PLAINTIFFS' OPPOSITION
TO TULARE COUNTY'S APPLICATION TO INTERVENE
AS A PARTY DEFENDANT

STATEMENT OF THE CASE

Many things have occurred in this case on its travels up through the courts and back since the complaint was filed on June 3, 1969. At this point, however, three basic issues remain:

1) Whether the defendants (all of whom are officials of the United States) may turn the Sequoia National Game Refuge over to Disney Productions, Inc. for a ski/summer resort complex consistent with 16 U.S.C. §688;

2) Whether the temporary use permits the defendants

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plan to issue to Disney are in reality permanent term permits in violation of the 80-acre limitations set forth in 16 U.S.C. §497; and

3) Whether the defendants have complied with the National Environmental Policy Act, 42 U.S.C. §§4321, et seq. in making their decision to turn the Sequoia National Game Refuge into a resort complex.

During the three years this case has been in the courts, neither Disney, the most logical intervenor, nor Tulare County, the present applicant have sought to intervene. Instead they have been content to let the United States Department of Justice represent their interests. The applicant, in particular, was content to file amicus briefs at earlier stages of this case.

Now, three years later, applicant Tulare County comes to court and requests intervention of right under Rule 24(a) and, in the alternative, permissive intervention under Rule 24(b). It appears from their papers that applicant is now discontented with the tactics of the Justice Department. At page 6 of their memorandum, applicant complains that "the government deemed it desirable to spend three years vindicating its views on standing rather than proceeding to resolve the merits of the case." As we will show herein, however, this is not a sufficient ground upon which to base intervention of right under Rule 24(a).

It is clear from the proposed answer of the applicant that applicant brings nothing to this case that is not already covered by the defendants except one additional dilatory defense (failure to exhaust administrative remedies). The issues raised by plaintiffs as outlined above raise the statutory duties of Federal officers. Applicant has no knowledge, authority or expertise with regard to those duties

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and, as a result, can add nothing to the defendants' case. On the other hand, the probability of undue delay, prejudice and increased expense to the present parties caused by intervention is manifest. Thus, permissive intervention under Rule 24(b) should be denied because the presence of Tulare County can serve no useful purpose, is untimely and will unnecessarily complicate, delay and increase the expense of this litigation.

ARGUMENT

I. Introduction

As numerous decisions make clear, Rule 24 is no "open sesame" to indiscriminate participation as a party by anyone who may feel he or she has something to say in a federal civil litigation. Thus, intervention should be denied if it can serve no useful purpose. Allen Calculators Inc. v. Illinois Central R. Co., 147 F. Supp. 513 (N.D. Ill., 1957). Above all, intervention has been denied where it was clear that the delay inevitably attendant on intervention outweighed any contribution the would-be intervenor could make to the case. Crosby Steam Gage & Valve Co. v. Manning, Maxwell and Moore, Inc. 51 F.Supp. 972, 973 (D. Mass., 1943), Wooten v. Moore, 42 FRD 236, 243 (E.D. N.C., 1967).

II. Applicant Is Not Entitled To Intervention Of Right Because The Applicant's Interests Are Adequately Represented By An Existing Party To The Lawsuit

Even though an applicant might be affected by the judgment, intervention is not allowable as a matter of right if he is in fact adequately represented by an existing party to the lawsuit. Reich v. Webb, 336 F.2d 153 (9th Cir., 1964); Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers, 3 FRD 251 (W.D. Va., 1943); Fielding v. Allen, 9 FRD 106 (S.D. N.Y., 1949). Moore's Federal Practice. 3B Moore 24.08(2)

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outlines what is necessary to show inadequacy of representation.

> "Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of non-feasance in his duty of representation. Inadequacy may sometimes also arise in cases where the representative is willing but unable to present the claim of the petitioner." 1/

None of these factors are present in applicant's request for intervention. Applicant merely asserts a bare allegation that its interests will not be represented. A stronger showing is necessary. In Peterson v. United States, 41 FRD 131 (D. Minn., 1966) the court reiterated the factors outlined in Moore, above, and denied intervention although the interests of the parties varied in kind and degree.

Applicant has made no showing of collusion between the parties, nor could it, since there has been no collusion. In fact, the parties have vigorously litigated this cause in all available forums, including the United States Supreme Court. Secondly, applicant has made no allegations to the effect that the interests of the original defendant is adverse to its own. Applicant is apparently interested in the development of Mineral King in the manner sought by the present defendants. Applicant has made no showing of neglect of duty of representation by the original defendant, nor does it seem likely that it could make such a showing. This court is well aware that counsel for the defendants have acted with competence throughout this case.

The only specific objection applicant has made is that "the government deemed it desirable to spend three years vindicating its views on standing rather than proceeding

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1/ See e.g. Farmland Irr. Co. v. Dopplmaier, 220 F.2d 247 (9th Cir., 1955); Stadin v. Union Electric Co., 309 F.2d 912 (8th Cir., 1962).

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to resolve the merits of the case." (Applicant's Motion to Intervene, p. 6). This, however, is merely a dispute over strategy and does not go to the issue of the adequacy of representation. In fact, applicant apparently did not object to this strategy strongly enough to seek intervention at an earlier stage. It was content to participate in the proceedings in the form of amicus curiae. In United Bank v. Superior Steel Corp., 9 FRD 124 (W.D. Pa., 1949) where the applicant had acquiesed in an existing party's representation of its interest for two years and then filed an application to intervene on the basis of inadequacy of representation, the motion was denied, as being untimely.

III. The Applicant Does Not Claim An Interest Relating To The Property Or Transaction Which Is The Subject Matter Of The Action Sufficient For Intervention Of Right

Applicant contends that it has a direct, economic interest in the development of Mineral King since such development will expand the tax base for the county and create secondary economic development in the area proximate to Mineral King. It also contends that it has an interest in the development of that area for recreational purposes. The latter interest is represented directly by the original defendant; and the former is not direct enough to satisfy the requirements of intervention by right. It is nothing more than the generalized desire of every county to increase its tax base. In reality, every lawsuit that affects property can affect the tax base to some degree. If such an interest is sufficient for intervention, then some county or city could intervene in a large portion of the civil litigation in this country. See generally, Edmonson v. State of Nebraska, 383 F.2d 123, 126 (8th Cir., 1967);

Old Colony Trust Co. v. Penrose

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Indus. Corp., 387 F.2d 939 (3rd Cir., 1968).

IV. Permissive Intervention Should Be Denied Because The Application Is Not Timely And Will Unnecessarily Delay, Complicate And Increase The Expense Of The Adjudication Of The Rights Of The Original Parties

This case was filed three years ago. Applicants did not see fit to intervene during that time until a few days ago. Courts have denied late intervention on the basis that, without more, it indicates applicant's acceptance of representation by existing parties, United States v. Superior Steel, supra. Nothing has changed in the defendants' conduct of this case that warrants a finding that the applicant's interests are suddenly inadequately represented.

Applicant's papers make it clear that it would contribute nothing new or constructive to the primary issues in this case. It is obvious that applicants will simply duplicate the original defendants' case, causing added delay and expense to the original parties and adding to the burden of the court. The only thing that applicant seems to have added to the case is the defense that plaintiffs have failed to exhaust their administrative remedies. However, neither applicant or defendants have ever suggested any additional remedy available to plaintiffs to exhaust. This addition appears to be simply dilatory and with no merit whatsoever.

In short, there is simply no showing by Tulare County that its presence in this case will lead to anything other than additional witnesses, duplicate proofs, dilatory defenses, more briefs and an unnecessary waste of the Court's and the original parties' time and resources. There is no showing that any of the above will assist the court in any significant respect. Allen Calculators v. National Cash Register, supra. In Crosby Steam Gas and Valve Co. v. Manning,

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Maxwell and Moore, Inc., supra, the reasons for denying intervention in such a case were well stated as follows:

> "It is easy enough to see what the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

CONCLUSION

The application to intervene is based on an interest, such as it is, that is adequately represented by the present defendants. Furthermore, the application is untimely and will contribute nothing to this case except dilatory defenses and the duplication of the defendants' case. Therefore, the plaintiffs respectfully request that the application of Tulare County to intervene of right, under Rule 24(a) and, in the alternative, with permission of the Court under Rule 24(b), be denied.

Respectfully submitted,

Dated: October 11, 1972

James Moorman

JAMES MOORMAN
Attorney for the Plaintiffs

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CERTIFICATE OF SERVICE BY MAIL

The undersigned certifies that he is an active member of the State Bar of California; that he is not a party to the within cause; that his business address is 311 California Street, Suite 311, San Francisco, California 94104; that he caused an envelope to be addressed to each of the following named persons; that he enclosed and sealed in each envelope a copy of the foregoing and attached document; and deposited each envelope with postage fully prepaid in the United States mail at San Francisco, California, on October 11, 1972.

Mr. E. Lewis Reid
STEINHART, GOLDBERG, FEIGENBAUM
& LADAR
One Post Street, Suite 3400
San Francisco, California 94104

Mr. Rodney Hamblin
Assistant United States Attorney
Federal Building, Room 16427
450 Golden Gate Avenue
San Francisco, California 94102

James Moorman

JAMES MOORMAN
Sierra Club Legal Defense
Fund, Inc.

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